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No. 02-451

Supreme Court U.S.
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In The

Supreme Court of the United States

AMPARO HERNANDEZ-GOMEZ,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner sustained serious head injuries during a rollover accident while she was a front-seat passenger in an automobile manufactured by respondent. Those injuries would have been prevented by the availability of a pelvic restraint, such as a simple lap seat belt, in the front passenger seat, but no such restraint was provided for petitioner's use by respondent.

Petitioner sought and recovered damages under Arizona common law for respondent's failure to provide any form of rollover accident protection. That award has been reversed by the Arizona Court of Appeals on the ground that this Court's intervening decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), "*compels us to conclude* that federal law implicitly preempts plaintiff's state tort claim" because respondent had complied with a minimum federal safety standard option that did not require any rollover protection. Pet. App. 12 (emphasis added). The question presented by the Petition for Certiorari is whether this decision (and similar decisions in the Fourth, Seventh and Eleventh Circuits) correctly interprets and applies *Geier*. It is clear that it does not.

I. THE DECISION BELOW MISAPPLIES *GEIER*.

1. The court below rested its implied preemption holding entirely on the facts, (i) that the applicable federal safety standard (FMVSS 208) gave respondent three passenger restraint-system options, (ii) that respondent chose an option that did not require the availability of any pelvic restraint or other means of rollover protection, and (iii) that "we read *Geier* as holding that FMVSS 208 gave manufacturers an unfettered choice among [its] options

and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option." Pet. App. 8.

We explain in our Petition, at pp. 18-21, why that reasoning was incorrect. *Geier* did not hold that the mere presence of federal regulatory options automatically preempts State common law claims. Such a rule would be completely inconsistent with *Geier*'s basic holding that state tort law is free to operate where "federal law creates only a floor, i.e., a minimum safety standard" and with the provision of the National Traffic and Motor Vehicle Safety Act that specifies that " 'motor vehicle safety standards' means a *minimum standard* for motor vehicle performance. . . . " 529 U.S. at 868; 15 U.S.C. § 1391(2) (emphasis added). *Geier* held common-law "no airbag" claims preempted only because the Court's examination of the specific history of the Department of Transportation's policy toward airbags during the late 1980s showed that, in light of the safety hazards and expense of airbags, as well as the public's skepticism toward them, DOT had affirmatively wanted to encourage the development, during a phase-in period, of some passive protection devices that did *not* include airbags. DOT therefore did not want airbags to be required in all cars during that time. State common law decisions resting tort liability on the absence of airbags would, *Geier* held, directly conflict with this DOT policy.

2. Perhaps understanding that the court below was plainly wrong to invoke *Geier* preemption merely because FMVSS 208 establishes a federal minimum safety standard for occupant crash-protection by offering three options, rather than through a single minimum safety requirement, respondent seeks to justify the decision

below by arguing that DOT's policy toward lap seat belts and other forms of pelvic restraint was similar to the DOT policy toward airbags that was recognized by the Court in *Geier*. Respondent thus argues that DOT sought to "authorize (and encourage) [passive restraint] systems without manual [seat] belts" in the same way that the *Geier* majority concluded that DOT had sought to encourage the development of some passive restraint systems that did not utilize airbags. Br. in Op. p. 12. If respondent were correct in asserting that federal regulators meant to encourage manufacturers to equip cars with passive occupant crash protection systems that contained no manual seat belts or other means of pelvic restraint, the present case would indeed resemble *Geier*. The assertion that federal safety policy in the 1980s sought to encourage automobile manufacturers to sell cars in the United States that contained no means of pelvic restraint against rollover accidents, however, is, with all respect, completely absurd.

Passive restraint systems are systems, like automatic shoulder belts and airbags, that require no action by the vehicle occupant to make them effective. Respondent's passive restraint system included no passive pelvic restraint. Without a pelvic restraint, such a system can be effective in protecting drivers and passengers in front end collisions, but it provides no meaningful protection against head injuries in rollover accidents. The addition of a pelvic restraint, such as a manual lap seat belt, is the only means of preventing devastating injuries, such as the one in this case, where a passenger's head or shoulders collide violently with the roof of a car that is involved in a rollover. To imagine that federal safety policy affirmatively encouraged the manufacture and sale of automobiles with protection systems that included no means of pelvic

restraint is to imagine the virtually unimaginable – that federal policy affirmatively encouraged the manufacture and sale of cars that offered no protection against violent head injuries in rollover accidents, even though the installation of simple manual lap seat belts (as a supplement to passive shoulder belts or airbags) would have offered such protection.

Such a federal policy would, moreover, be senseless as well as inhumane. Unlike airbags, manual lap seat belts are inexpensive to manufacture and install. Unlike airbags, the installation of manual lap seat belts creates no safety hazards. Manual lap seat belts do not interfere in any way with the installation or operation of passive systems that provide protection in frontal crashes. The federal regulators who drafted FMVSS 208 undoubtedly assumed that automobile manufacturers who chose to utilize a passive system for protection in frontal crashes would naturally install manual lap seat belts that occupants could use for protection in rollover accidents. No conflict with federal policy could possibly be created if a state's common law were to hold a manufacturer liable for not providing such simple rollover protection.

3. Respondents argue that federal policy favored a "variety" and "mix" of different passive restraint systems. Even if such a policy existed, it would not in any way be frustrated or interfered with by state common-law decisions imposing liability for the failure to provide car occupants with some form of pelvic restraint protection against head injuries in rollover accidents. Unlike the situation with airbags, where imposition of common law liability for the failure to provide an airbag would have directly collided with a federal policy to encourage the development of systems that do *not* use airbags, common

law liability for failure to provide pelvic restraint protection in rollovers would in no way discourage development of the widest possible variety of passive restraint systems. It would, indeed, usefully *encourage* the development of passive systems that include passive pelvic restraint. Pending that development, common law liability would simply encourage the addition of some form of pelvic restraint to passive systems that themselves lack any pelvic restraint.

4. Despite respondents' protestations to the contrary (see Br. in Op. p. 11), this Court's decision in *Geier* was, in fact, expressly based upon considerations specific to *airbags*. It was the expense and safety hazards of *airbags*, and the public's consequent skepticism toward *airbags*, that caused DOT to seek to encourage development of non-airbag – as well as airbag – systems for frontal crash protection. Manual lap seat belts, on the other hand, involve relatively little expense and cause no safety hazards. Occupants probably do not use them as often as they should, but no harm can possibly be done – and no useful technological development could possibly be impeded – if state common law were to encourage manufacturers to make some form of pelvic restraint available to all car occupants.

II. THE DECISION BELOW CONFLICTS WITH THE VIEWS OF THE UNITED STATES.

As we describe in our Petition for Certiorari, pp. 19-21, the decision below is also in direct conflict with the position consistently taken by the Solicitor General in amicus filings in this Court on behalf of the United States. See, e.g., the Brief for the United States as *Amicus Curiae* Supporting Affirmance in *Geier v. American Honda Motor*

Co. (No. 98-1811, O.T. 1999), p. 21 n. 18: "We therefore agree with petitioners that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose."

The United States has continued, since *Geier*, to adhere firmly to this approach. This Term, in his Brief *Amicus Curiae* Supporting Petitioner in *Sprietsma v. Mercury Marine* (No. 01-706, O.T. 2002, *cert. granted*, January 22, 2002, oral argument, October 15, 2002), pp. 19-20, the Solicitor General explained that

> The Court in *Geier* recognized that a federal "minimum safety standard" – which obviously reflects the agency's considered decision regarding the appropriate level of federal regulation – will not categorically preempt "nonidentical state standards established in tort actions covering the same aspect of performance." The *Geier* Court based its preemption holding not on a per se rule, but on a careful analysis of the pertinent safety standard and the extent to which common-law liability would frustrate the purposes embodied in that standard.

As we have explained above and in our Petition, the court below engaged in no such careful analysis, nor would common-law liability in this case in fact frustrate any plausible federal safety policy.

III. THE QUESTIONS ARE IMPORTANT.

The *Geier* decision was a careful attempt by the Court to give effect to a specific federal preemptive policy regarding airbags, while continuing to recognize the general power of state common law to impose tort liability under

the Safety Act's savings clause, despite a car manufacturer's compliance with minimum federal safety standards. The decision below, along with decisions in three federal circuits, would instead convert *Geier* into a sledge hammer that would demolish the common law whenever federal regulators may have chosen to express minimum federal safety standards in the form of two or more regulatory options, rather than in a single minimum safety requirement. Respondents' brief in opposition, filed on behalf of a major automobile manufacturer, fully supports that position.

This case directly presents the question whether *Geier* preempts the common law merely because of the existence of two or more federal regulatory options. If the Court were to decline to review it, it would undoubtedly be taken as indicating the Court's approval of respondent's blunderbuss approach. As a result, the common law would be excluded as a vehicle for addressing, not only dangerous defects in automobile occupant crash-protection systems, but defects in any safety system where federal regulators happen to have provided minimum regulatory options. *Geier* did not – and could not – intend that drastic nullification of Congress's express decision to preserve common-law remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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